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No. 95-1732

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE OREGON ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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62pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

The Petition should be granted to eliminate conflict among the circuits; to settle an important federal question that the Ninth Circuit has decided based on a misapplication of a decision of this Court; and to restore the CWA's crucial balance between the reliability of NPDES permits and enforcement ... 3

ARGUMENT 3

A. The decision below creates a conflict in the circuits 3

B. The decision below misapplies a prior ruling of this Court 4

C. The decision below upsets the CWA's balance between reliability of NPDES permits and enforcement 5

D. Citizens are not left without a significant remedy 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993), cert. denied, ___ U.S. ___ 115 S. Ct. 62, 130 L.Ed.2d 19 (1994) 3, 8

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S. Ct. 1784, 68 L.Ed.2d 114 (1981) 7

Northwest Environmental Advocates v. City of Portland, 11 F.3d 900 (9th Cir. 1993) (NWEA I) 6

Northwest Environmental Advocates v. City of Portland, 56 F.3d 979 (1995) (NWEA II) 4, 9

Northwest Environmental Advocates v. City of Portland, 74 F.3d 945 (1996) 4, 10

Oregon Natural Resources Council v. United States Forest Service, 84 F.2d 842 (9th Cir. 1987) 4

PUD No. 1 of Jefferson County v. Washington Department of Ecology, ___ U.S. ___, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994) 4

United States v. Hooker Chemicals and Plastics Corp., 749 F.2d 968 (2d Cir. 1984) 3

FEDERAL STATUTES

33 U.S.C. §1251, *et seq.* 1

33 U.S.C. §1342(b) 8

33 U.S.C. §1342(h) 8

33 U.S.C. §1365 4

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

ORS 183.484(1) and (2) 11

ORS 183.484(4) 11

ORS 183.497(1) 11

FEDERAL REGULATIONS

40 C.F.R. §122.44(a), (b)(1), (c) and (d)(1)(i)..... 10

40 C.F.R. §123.1(i)(2)..... 8

40 C.F.R. §123.25 11

40 C.F.R. §124 10

40 C.F.R. §124.10(a)(1)(ii), (b) and (d) 10

40 C.F.R. §124.10(e)..... 10

40 C.F.R. §124.12(a)..... 11

40 C.F.R. §124.17 11

40 C.F.R. §124.8..... 11

OREGON ADMINISTRATIVE RULES

OAR 340-41-005 through 340-41-150..... 5

OAR 340-41-120(1)..... 6

OAR 340-41-445(2)(a), (c), (d) and (e) 7

OAR 340-45-035 11

OAR 340-45-035(3)(a) and (b), (4), (6), (7) and (8) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER

Alder, Addressing Barriers to Watershed Protection, 25 Envtl. L. 973, 1106 n. 118 (1995) 2, 6

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Oregon Association of Clean Water Agencies (ACWA) is an Oregon nonprofit corporation. Of ACWA's 76 members, 63 are Oregon cities and other public agencies providing municipal sewage treatment and disposal. ACWA's 64 public member agencies have a population of at least 1,691,855 which is about 54% of Oregon's population of 3,132,000.

ACWA was formed to initiate and participate in the development of sound environmental policies; to promote public awareness and education; and to promote interagency coordination, assistance and partnership in order to fulfill a shared vision of water quality protection. It is ACWA's policy to provide legal assistance in the form of *amicus curiae* briefs, or otherwise, when the issue involved significantly affects a range of members and a favorable outcome would further the interests of ACWA as a whole.

ACWA's members have a vital interest in the proper interpretation and application of the Clean Water Act, 33 U.S.C. §1251, *et seq.* (CWA) because they operate their sewage treatment facilities pursuant to National Pollutant Discharge Elimination System (NPDES) permits issued by the Oregon Department of Environmental Quality (DEQ) and approved by the United States Environmental Protection Agency (EPA).

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[1] This brief is being filed with the written consent of the parties pursuant to Rule 37.2. The consents of the parties are being filed separately with the Clerk of the Court.

The NPDES permit system subjects publicly owned treatment works (POTWs) to a complex array of requirements including, but not limited to, specific effluent limitations, general water quality standards, sludge disposal, ground water protection, infiltration and inflow reduction, mixing zones, industrial pretreatment programs and extensive monitoring and reporting requirements, to name a few. Many of these requirements are based on difficult scientific and engineering judgments regarding the probable effect of different pollutant loads on receiving waters and the likelihood of being able to achieve those loads.

The planning, design, siting and construction of municipal sewage treatment plants to meet the NPDES permit requirements is a long, often arduous and always expensive process. Therefore, POTWs are usually designed to serve their communities for periods of 20 years or more. In the last 20 years, ACWA's members and other Oregon public agencies have spent more than $1,200,000,000 for the construction and upgrading of sewage treatment facilities to protect Oregon's rivers and streams. Nationwide, federal, state and local governments invested more than $128,000,000,000 from 1972 to 1989 in municipal treatment sewage facilities. *Alder, Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973, 1106 n. 118 (1995).

The decision below – which holds that a citizens suit may be brought to enforce general water quality standards which have not been translated into end-of-pipe effluent limitations – undermines the reliability of NPDES permits as sources of guidance for sewage treatment plant construction and operation; disrupts long term

municipal financial planning; and raises the specter of financial instability for many communities. This is of enormous concern to ACWA's members, who now find themselves subject to a different interpretation of the CWA simply because they are located within the jurisdiction of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Petition should be granted to eliminate conflict among the circuits; to settle an important federal question that the Ninth Circuit has decided based on a misapplication of a decision of this Court; and to restore the CWA's crucial balance between the reliability of NPDES permits and enforcement.

ARGUMENT

A. The decision below creates a conflict in the circuits.

It is unnecessary to reiterate the City of Portland's (Portland) explanation of how the decision below conflicts with the decisions of the Second Circuit in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), cert. denied, ___ U.S. ___ 115 S. Ct. 62, 130 L.Ed.2d 19 (1994) and *United States v. Hooker Chemicals and Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), which hold that CWA citizens suits may be brought only to enforce specific effluent standards or limitations. However, it is important to emphasize that prior to the decision in this case, no court had interpreted the CWA to allow the enforcement of general water quality standards through

citizens suits. *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 991 (1995) (Kleinfeld, J., dissenting), (NWEA II); *Northwest Environmental Advocates v. City of Portland*, 74 F.3d 945, 948 (1996) (O'Scannlain, J., dissenting from order denying Portland's petition for rehearing).

The decision below even conflicts with the Ninth Circuit's prior decision in *Oregon Natural Resources Council v. United States Forest Service*, 84 F.2d 842 (9th Cir. 1987) wherein the court stated that the limitations necessary to meet water quality standards rather than the water quality standards themselves are what may be enforced in a CWA citizens suit under 33 U.S.C. §1365. *Id.* at 850.

B. The decision below misapplies a prior ruling of this Court.

The linchpin of the rationale for withdrawing the court's original decision was that *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994)

> cast into considerable doubt our holding . . . that citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-pipe effluent limitations.

NWEA II, 56 F.3d at 981. However, as was pointed out in Judge Kleinfeld's dissent:

> *Jefferson County* does not involve a citizen's suit, says nothing about citizen's suits and implies nothing about citizen's suits. *Id.* at 990.

C. The decision below upsets the CWA's balance between reliability of NPDES permits and enforcement.

The NPDES permit system is a complex process pursuant to which EPA or delegated state agencies, such as DEQ, issue permits allowing POTWs (and other entities) to discharge wastes into receiving waters subject to the effluent limits and other conditions set forth in the permits. The CWA sets out a general framework based on achieving minimum numerical technology based effluent limitations; requiring the states to designate the beneficial uses of receiving waters and establish general water quality standards therefor; and establishing a permit issuance and enforcement system to ensure protection of the quality of receiving waters.

Oregon Administrative Rules (OAR) Chapter 340, Division 41 sets forth DEQ's plan for managing water quality in Oregon. It sets out general policies that restrict degradation of surface waters; require all POTWs to develop long term financing plans to address wastewater needs; and provide an implementation program applicable to all 19 basins in Oregon. OAR 340-41-005 through 340-41-150. The rules also designate beneficial uses, general water quality standards and minimum design criteria for treatment and control of wastes on a basin-by-basin basis. OAR 340-41-202 through 340-41-975. General water quality standards are set separately for each basin and include dissolved oxygen, temperature, turbidity, pH, bacteria and total dissolved solids, among others. The minimum POTW design criteria set forth numerical effluent limitations which must be achieved based on the more stringent of CWA or Oregon requirements. *See, e.g.*,

OAR 340-41-442 through 340-41-470 which set the standards for the Willamette Basin in which Portland and many other ACWA members are located.

The plan is implemented through a permit and enforcement system which prohibits any discharge other than pursuant to a permit issued by DEQ and approved by EPA. OAR 340-41-120(1).

In the last 20 years, Oregon's communities have spent more than $1,200,000,000 building and upgrading their sewage treatment facilities to meet state and federal standards. In 1990, EPA projected the need to spend $110,000,000,000 nationally to meet sewage treatment needs through the year 2010. *Alder, Addressing Barriers to Watershed Protection, supra,* 25 Envtl. L. 973, 1106 n. 118 (1995).

> Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for the future with the assurance that if they remain within their concrete permit parameters, they will remain on the correct side of the law.

Northwest Environmental Advocates v. City of Portland, 11 F.3d 900, 911 (9th Cir. 1993) (NWEA I).

Municipal treatment facilities are a combination of mechanical, biological and chemical processes to remove pollutants from wastewater before discharging it to the receiving waters. Engineers can design such facilities to achieve removal pollutant rates sufficient to comply with specific effluent limits. They cannot design to meet general water quality standards for changing conditions in

the receiving waters which are beyond the POTWs' control. Information on receiving water quality is not generally available on a frequent basis. More importantly, the quality of the receiving waters depends to a large degree on changing natural conditions and the effects of other point and nonpoint discharges over which the permittee has no control.

For example, while a permittee can plan, design, construct and operate facilities to control the levels of dissolved oxygen, bacteria, turbidity and pH of its effluent, it cannot control those levels in the receiving waters. It is just those levels which determine general water quality. *See, e.g.*, OAR 340-41-445(2)(a), (c), (d) and (e).

Allowing citizens suits to enforce general water quality standards as the Ninth Circuit has done here will necessarily make the federal courts rather than EPA and state regulatory agencies the primary "agency" setting discharge standards for this nation's POTWs. Such a role for the federal courts has already been rejected by this Court. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 320, 101 S. Ct. 1784, 68 L.Ed.2d 114 (1981).

Conversely, citizen enforcement of specific numerical effluent limits will neither unduly burden the planning process nor the court system. Communities can and should plan their facilities to ensure that required pollutant levels in their effluent are achieved, and in this situation the courts are not called upon to determine whether ambiguous general standards have been exceeded due to the conduct of one permittee. In short, the difference in effect between the enforcement options for numerical effluent limits and general water quality

standards is the balance point between the ability to plan for, construct and operate treatment facilities which will satisfy regulatory requirements and financial chaos.

A ruling that citizens cannot sue to enforce general water quality standards neither creates an anomaly under the CWA nor leaves our nation's waters unprotected. The permit condition at issue here provides that notwithstanding the permit's effluent limits, Portland cannot discharge wastes which violate water quality standards except in the mixing zone. The same condition is in every NPDES permit issued by DEQ to POTWs in Oregon. The condition's reach is obviously not restricted to combined sewer overflows (CSOs).[2] Notably, neither the CWA nor its implementing regulations require such a restrictive condition. This condition is imposed by DEQ as one of the more stringent optional requirements states may impose under the CWA. 33 U.S.C. §1342(b). Indeed this condition is not part of the federal enforcement program. 40 C.F.R. §123.1(i)(2). Accordingly, there is no reason it should be subject to enforcement through the citizens suit provision of the CWA. *Eastman Kodak Co.*, 12 F.3d at 359. However, enforcement of such provisions may be sought through either state regulatory agencies or EPA. *Id.*, 33 U.S.C. §1342(h).

The availability of enforcement by the regulatory agencies provides the oversight which produces the protection envisioned by the CWA. It is the regulatory agencies and their expert staffs with whom the permittees

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[2] Of the 239 cities in Oregon, only 11 have combined sanitary and storm water sewers.

interact most in the permit issuance process. As a result, they are in a much better position than private citizens to make the discretionary judgments which are necessary not only in the permit issuance process but at the enforcement stage.

> Water quality standards are a useful device for government enforcement authorities (who decided not to prosecute this case against the City of Portland), because they provide standards for effluent limitations and goals toward which enforcement should be aimed. They are too uncertain and amorphous, however, for use against specific polluters.

NWEA II, 56 F.3d at 992 (Kleinfeld, J., dissenting).

The estimated cost for correcting Portland's CSO problem is $500,000,000 to $1,200,000,000. Both DEQ and the citizen plaintiffs want the situation corrected. In the exercise of its discretion, DEQ allowed Portland a period of several years to redress the problem. During that time, Portland will have the opportunity to raise and spend the money to do it with as little financial disruption as possible. The practical effect of the citizens suit, however, would be to use the federal courts to require Portland to address the CSO problem without regard to other pressing needs it may face. The CWA does not require such a remedy and the federal courts should not, at the behest of citizens, stray into this arena and impose such a remedy absent a clear mandate by Congress. If the federal courts allow citizens to sue to enforce general water quality standards, they may be besieged by citizens suits demanding the impossible from cities who neither have the funds nor the ability to solve general water quality

problems for which they are neither the sole nor the primary cause. As Judge O'Scannlain aptly put it:

> While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizens suits against permittees who are meeting the specific requirements (i.e., effluent limitations) outlined in their permits.

Northwest Environmental Advocates v. City of Portland, 74 F.3d at 946.

D. Citizens are not left without a significant remedy.

The federal regulatory scheme requires that NPDES permits contain numerous provisions such as technology-based effluent limits, standards for sewage sludge disposal, reopener clauses and other effluent limitations to control all pollutants which have a reasonable potential to cause an exceedence of any state water quality standard. 40 C.F.R. §122.44(a), (b)(1), (c) and (d)(1)(i). It also establishes an elaborate permit issuance process in which the public is given ample opportunity to participate. 40 C.F.R. §124. A regulatory agency must give public notice that a draft permit has been prepared and allow a minimum of 30 days for public comment. Minimum standards are set for the contents of all public notices. 40 C.F.R. §124.10(a)(1)(ii), (b) and (d). The public notice must include a copy of a fact sheet containing extensive information related to the nature of the proposed permit, the wastes to be discharged, the basis for permit conditions,

the dates for the public comment period and the procedures for requesting a hearing. 40 C.F.R. §124.8 and §124.10(e). A public hearing is required any time there is "a significant degree of public interest in a draft permit." 40 C.F.R. §124.12(a). Finally, a written response is required to public comments on the issuance of a final permit. 40 C.F.R. §124.17. These requirements as well as many others are made applicable to state programs pursuant to 40 C.F.R. §123.25.

Oregon's rules for the issuance of NPDES permits are set forth at OAR 340-45-035. As required by the federal regulations, these rules provide for public notice, comment periods, preparation and distribution of fact sheets, public hearings and responses to public comments. OAR 340-45-035(3)(a) and (b), (4), (6), (7) and (8). The Oregon rules also provide that the expected impact on the water quality of the receiving waters must be specifically addressed. OAR 340-45-035(3) and (4). Perhaps most notably for the purposes of this case, if a member of the public is dissatisfied with the terms of the permit, an action may be filed in the state courts under Oregon's Administrative Procedures Act. ORS 183.484(1) and (2). The state courts have the authority to affirm, reverse or remand the permit. ORS 183.484(4). Successful citizen plaintiffs may even recover their reasonable attorney fees and costs in such actions. ORS 183.497(1).

The existing process provides numerous avenues for citizens' input and to challenge decisions in the state courts. There is no reason for the federal courts then, to read into the CWA a requirement that citizens may bring a federal court suit based on an alleged violation of general water quality standards.

CONCLUSION

The CWA's authority for citizens suits is limited to the enforcement of specific effluent standards established by the appropriate regulatory agency to protect water quality. It does not extend to claimed violations of general water quality standards where the permittee has complied with the specific effluent limitations in its permit. The decision below creates a conflict in the circuits and misapplies a prior decision of this Court. Moreover, it upsets the delicate balance between the reliability of NPDES permits and enforcement.

This case is not just about CSO problems. Under *NWEA II*, every general water quality standard established by a state gives rise to a potential citizens suit. Thus, the decision raises the specter that the long term financial plans of every city in Oregon and in the Ninth Circuit, may be severely undermined. American cities have many pressing needs of which the protection of water quality is one. They should be able to plan, construct and operate sewage treatment works in reliance on the effluent limits established in their discharge permits without disruption by the unwarranted expansion of federal court jurisdiction sanctioned by the Ninth Circuit in this case. The limited financial resources of our nation's cities should not become a pawn in the battle between regulatory agencies and dissatisfied citizens regarding the perniciousness of the effect of permitted discharges on amorphous water quality standards. The petition for

certiorari should be granted and the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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183.484 Jurisdiction for review of orders other than contested cases; procedure; scope of court authority. (1) Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office.

(4)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

* * *

183.497 Awarding costs and attorney fees when finding for petitioner. (1) In a judicial proceeding designated under subsection (2) of this section the court:

(a) May, in its discretion, allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner.

(b) Shall allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner and determines that the state agency acted without a reasonable basis in fact or in law; but the court may withhold all or part of the attorney fees from any allowance to a petitioner if the court finds that the state agency has proved that its action was substantially justified or that special circumstances exist that make the allowance of all or part of the attorney fees unjust.

* * *

WATER POLLUTION

DIVISION 41

STATE-WIDE WATER QUALITY MANAGEMENT PLAN; BENEFICIAL USES, POLICIES, STANDARDS, AND TREATMENT CRITERIA FOR OREGON

Preface

340-41-001 (1) The rules which follow, together with the applicable laws of the State of Oregon and the applicable regulations of the Environmental Quality Commission, set forth Oregon's plans for management of the quality of public waters within the State of Oregon.

(2) Under this plan, the Department of Environmental Quality will continue to manage water quality by evaluating each discharge and activity, whether existing or a new proposal, on a case-by-case basis, based on best information currently available and within the limiting framework of minimum standards, treatment criteria, and policies which are set forth in the plan.

(3) The EQC recognizes that the deadlines for adoption of this plan prevented thorough involvement by local government in the development and review of the plan. Accordingly, the Department will review the contents of this plan with affected local governments and will use their comments and suggestions in preparing amendments for consideration by the EQC not later than December, 1977. At a minimum, the processes of coordination with local governments will consist of the following elements:

(a) Work with county coordinators to set up meetings to explain the plan to groups of local governments and solicit their comments;

(b) Provide copies of the plan and supporting documents to any affected local governments who have not already received them;

(c) Seek input from councils of governments;

(d) Upon request, visit local level governments to discuss the plan;

(e) Work with statewide associations of local governments and others to inform local governments of the plan.

(1) "BOD" means five-day 20° C. Biochemical Oxygen Demand.

(2) "DEQ" or "Department" means the Oregon State Department of Environmental Quality.

(3) "DO" means dissolved oxygen.

(4) "EQC" or "Commission" means the Oregon State Environmental Quality Commission.

(5) "Estuarine waters" means all mixed fresh and oceanic waters in estuaries or bays from the point of oceanic water intrusion inland to a line connecting the outermost points of the headlands or protective jetties.

(6) "Industrial Waste" means any liquid, gaseous, radioactive, or solid waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business, or from the development or recovery of any natural resources.

(7) "Marine Waters" means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of the State of Oregon.

(8) "Mg/l" means milligrams per liter.

(9) "Pollution" means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt, or odor of the waters, or such radioactive or other substance into any waters of the state which either by itself or in connection with any other substance present, will or can reasonably be expected to create a public nuisance or render such waters harmful, detrimental, or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life, or the habitat thereof.

(10) "Public Water" means the same as "waters of the state".

(11) "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, or other places together with such groundwater infiltration and surface water as may be present. The admixture with sewage as herein defined of industrial wastes or wastes, as defined in sections (6) and (13) of this rule, shall also be considered "sewage" within the meaning of this division.

(12) "SS" means suspended solids.

(13) "Wastes" means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive, or other substances which will or may cause pollution or tend to cause pollution of any water of the state.

(14) "Waters of the State" include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.

(15) "Low Flow Period" means the flows in a stream resulting from primarily groundwater discharge or baseflows augmented from lakes and storage projects during the driest period of the year. The dry weather period varies across the state according to climate and topography. Wherever the low flow period is indicated in the Water Quality Management Plans, this period has been approximated by the inclusive months. Where applicable in a waste discharge permit, the low flow period may be further defined.

(16) "Secondary Treatment" as the following context may require for:

(a) "Sewage wastes" means the minimum level of treatment mandated by EPA regulations pursuant to Public Law 92-500;

(b) "Industrial and other waste sources" imply control equivalent to best practicable treatment (BPT).

(17) "Nonpoint Sources" refers to diffuse or unconfined sources of pollution where wastes can either enter into – or be conveyed by the movement of water to – public waters.

(18) "Loading Capacity (LC)" – The greatest amount of loading that a water can receive without violating water quality standards.

(19) "Load Allocation (LA)" – The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting loading. Whenever possible, natural and nonpoint source loads should be distinguished.

(20) "Wasteload Allocation (WLA)" – The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(21) "Total Maximum Daily Load (TMDL)" – The sum of the individual WLAs for point sources and LAs for nonpoint sources and background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background

sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste-load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(22) "Land Development" refers to any human induced change to improved or unimproved real estate, including but not limited to construction, installation or expansion of a building or other structure, land division, drilling, and site alteration such as that due to land surface mining, dredging, grading, construction of earthen berms, paving, improvements for use as parking or storage, excavation or clearing.

(23) "Jurisdiction" refers to any city or county agency in the Tualatin River and Oswego Lake subbasins that regulates land development activities within its boundaries by approving plats, site plans or issuing permits for land development.

(24) "Erosion Control Plan" shall be a plan containing a list of best management practices to be applied during construction to control and limit soil erosion.

(25) "Public Works Project" means any land development conducted or financed by a local, state, or federal governmental body.

(26) "Stormwater Quality Control Facility" refers to any structure or drainage way that is designed, constructed, and maintained to collect and filter, retain, or

detain surface water runoff during and after a storm event for the purpose of water quality improvement. It may also include, but not be limited to, existing features such as wetlands, water quality swales, and ponds which are maintained as stormwater quality control facilities.

(27) "Water Quality Swale" is a natural depression or wide shallow ditch use to temporarily store, route, or filter runoff for the purpose of improving water quality.

(28) "In Lieu Fee" means a fee collected by a jurisdiction in lieu of requiring construction of onsite stormwater quality control facilities.

(29) "Effluent Limited" can mean one of the following categories:

(a) A receiving stream which is meeting and/or is expected to meet water quality standards with the implementation of standard treatment technology which is secondary treatment for sewage wastes and best practicable treatment (BPT) for industrial and other waste sources;

(b) A receiving stream for which there is insufficient information to determine if water quality standards are being met with standard treatment technology.

(30) "Water Quality Limited" can mean one of the following categories:

(a) A receiving stream which does not meet instream water quality standards during the entire year or defined season even after the implementation of standard technology;

(b) A receiving stream which achieves and is expected to continue to achieve instream water quality

standard but utilizes higher than standard technology to protect beneficial uses;

(c) A receiving stream for which there is insufficient information to determine if water quality standards are being met with higher than standard treatment technology or where through professional judgment the receiving stream would not be expected to meet water quality standards during the entire year or defined season without higher than standard technology.

(31) "Reserve Capacity" means that portion of a receiving stream's loading capacity which has not been allocated to point sources or nonpoint sources and natural background as waste load allocations or load allocations, respectively. The reserve capacity includes that loading capacity which has been set aside for a safety margin and is otherwise unallocated.

(32) "Aquatic Species" means any plants or animals which live at least part of their life cycle in waters of the State.

(33) "Biological Criteria" means numerical values or narrative expressions that describe the biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use.

(34) "Designated Beneficial use" means the purpose or benefit to be derived from a water body, as designated by the Water Resources Department or the Commission.

(35) "Indigenous" means supported in a reach of water or known to have been supported according to historical records compiled by State and Federal agencies or published scientific literature.

(36) "Resident Biological Community" means aquatic life expected to exist in a particular habitat water quality standards for a specific ecoregion, basin, or water body are met. This shall be established by accepted biomonitoring techniques.

(37) "Without Detrimental Changes in the Resident Biological Community" means no loss of ecological integrity when compared to natural conditions at an appropriate reference site or region.

(38) "Ecological Integrity" means the summation of chemical, physical and biological integrity capable of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region.

(39) "Appropriate Reference Site or Region" means a site on the same water body, or within the same basin or ecoregion that has similar habitat conditions, and represents the water quality and biological community attainable within the areas of concern.

(40) "Critical Habitat" means those areas which support rare, threatened or endangered species, or serve as sensitive spawning and rearing areas for aquatic life.

(41) "High Quality Waters" means those waters which meet or exceed those levels that are necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water, and other designated beneficial uses.

(42) "Outstanding Resource Waters" means those waters designated by the Environmental Quality Commission where existing high quality waters constitute an outstanding state or national resource based on their extraordinary water quality or ecological values, or where special water quality protection is needed to maintain critical habitat areas.

(43) "Short-Term Disturbance" means a temporary disturbance where water quality standards may be violated briefly, but not of sufficient duration to cause acute or chronic effects on beneficial uses.

Stat. Auth: ORS 183.500, 468.020, 468.705, 468.710 & 468.735

Policies and Guidelines Generally Applicable to All Basins

340-41-026 (1) In order to maintain the quality of waters in the State of Oregon, the following is the general policy of the EQC:

(a) Antidegradation Policy for Surface Waters. The purpose of the Antidegradation Policy is to guide decisions that affect water quality such that unnecessary degradation from point and nonpoint sources of pollution is prevented, and to protect, maintain, and enhance existing surface water quality to protect all existing beneficial uses. The standards and policies set forth in OAR 340-41-120 through 340-41-962 are intended to implement the Antidegradation Policy:

(A) High Quality Waters Policy: Where existing water quality meets or exceeds those levels necessary to

support propagation of fish, shellfish, and wildlife and recreation in and on the water, and other designated beneficial uses, that level of water quality shall be maintained and protected. The Environmental Quality Commission, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, and with full consideration of sections (2), (3) and (5) of this rule, however, may allow a lowering of water quality in these high quality waters if they find:

(i) No other reasonable alternatives exist except to lower water quality; and

(ii) The action is necessary and justifiable for economic or social development benefits and outweighs the environmental costs of lowered water quality; and

(iii) All water quality standards will be met and beneficial uses protected.

(B) The Director or a designee may allow lower water quality on a short term basis in order to respond to emergencies or to otherwise protect public health and welfare;

(C) Water Quality Limited Waters Policy: For water quality limited waterbodies, the water quality shall be managed as described in section (3) of this rule;

(D) Outstanding Resource Waters Policy: Where existing high quality waters constitute an outstanding state or national resource such as those waters designated as extraordinary resource waters, or as critical habitat areas, the existing water quality and water quality values

shall be maintained and protected, and classified as "Outstanding Resource Waters of Oregon". The Commission may specially designate high quality waterbodies to be classified as Outstanding Resource Waters in order to protect the water quality parameters that affect ecological integrity of critical habitat or special water quality values that are vital to the unique character of those waterbodies. The Department will develop a screening process and establish a list of nominated waterbodies for Outstanding Resource Waters designation in the Biennial Water Quality Status Assessment Report (305(b) Report). The priority waterbodies for nomination include:

(i) National Parks;

(ii) National Wild and Scenic Rivers;

(iii) National Wildlife Refuges;

(iv) State Parks; and

(v) State Scenic Waterways.

(E) The Department will bring to the Commission a list of waterbodies which are proposed for designation as Outstanding Resource Waters at the time of each Triennial Water Quality Standards Review.

(F) In designating Outstanding Resource Waters, the Commission shall establish the water quality values to be protected and provide a process for determining what activities are allowed that would not affect the outstanding resource values. After the designation, the Commission shall not allow activities that may lower water quality below the level established except on a short term basis to respond to emergencies or to otherwise protect human health and welfare.

(b) Point source discharges shall follow policies and guidelines in sections (2), (5), and (6) of this rule, and nonpoint source activities shall follow guidelines in sections (7), (8), (9), (10), and (11) of this rule.

(2) In order to maintain the quality of waters in the State of Oregon, it is the general policy of the EQC to require that growth and development be accommodated by increased efficiency and effectiveness of waste treatment and control such that measurable future discharged waste loads from existing sources do not exceed presently allowed discharged loads except as provided in section (3) of this rule.

(3) The Commission or Department may grant exceptions to sections (2) and (6) of this rule and approvals to section (5) of this rule for major dischargers and other dischargers, respectively. Major dischargers include those industrial and domestic sources that are classified as major sources for permit fee purposes in OAR 340-45-075(2):

(a) In allowing new or increased discharged loads, the Commission or Department shall make the following findings:

(A) The new or increased discharged load would not cause water quality standards to be violated;

(B) The new or increased discharge load would not unacceptably threaten or impair any recognized beneficial uses. In making this determination, the Commission or Department may rely upon the presumption that if the numeric criteria established to protect specific uses are met the beneficial uses they were designed to protect are

protected. In making this determination the Commission or Department may also evaluate other state and federal agency data that would provide information on potential impacts to beneficial uses for which the numeric criteria have not been set;

(C) The new or increased discharged load shall not be granted if the receiving stream is classified as being water quality limited under OAR 340-41-006(30)(a), unless:

(i) The pollutant parameters associated with the proposed discharge are unrelated either directly or indirectly to the parameter(s) causing the receiving stream to violate water quality standards and being designated water quality limited; or

(ii) Total maximum daily loads (TMDLs), waste load allocations (WLAs) load allocations (LAs), and the reserve capacity have been established for the water quality limited receiving stream; and compliance plans under which enforcement action can be taken have been established; and there will be sufficient reserve capacity to assimilate the increased load under the established TMDL at the time of discharge; or

(iii) Under extraordinary circumstances to solve an existing, immediate, and critical environmental problem that the Commission or Department may consider a waste load increase for an existing source on a receiving stream designated water quality limited under OAR 340-41-006(30)(a) during the period between the establishment of TMDLs, WLAs and LAs and their achievement based on the following conditions:

(I) That TMDLs, WLAs and LAs have been set; and

(II) That a compliance plan under which enforcement actions can be taken has been established and is being implemented on schedule; and

(III) That an evaluation of the requested increased load shows that this increment of load will not have an unacceptable temporary or permanent adverse effect on beneficial uses; and

(IV) That any waste load increase granted under subparagraph (iii) of this paragraph is temporary and does not extend beyond the TMDL compliance deadline established for the waterbody. If this action will result in a permanent load increase, the action has to comply with subparagraphs (i) or (ii) of this paragraph.

(D) The activity, expansion, or growth necessitating a new or increased discharge load is consistent with the acknowledged local land use plans as evidenced by a statement of land use compatibility from the appropriate local planning agency.

(b) Oregon's water quality management policies and programs recognize that Oregon's water bodies have a finite capacity to assimilate waste. Unused assimilative capacity is an exceedingly valuable resource that enhances in-stream values specifically, and environmental quality generally. Allocation of any unused assimilative capacity should be based on explicit criteria. In addition to the conditions in subsection (a) of this section, the Commission or Department shall consider the following:

(A) Environmental Effects Criteria:

(i) Adverse Out-of-Stream Effects. There may be instances where the non-discharge or limited discharge alternatives may cause greater adverse environmental effects than the increased discharge alternative. An example may be the potential degradation of groundwater from land application of wastes;

(ii) Instream Effects. Total stream loading may be reduced through elimination or reduction of other source discharges or through a reduction in seasonal discharge. A source that replaces other sources, accepts additional waste from less efficient treatment units or systems, or reduces discharge loadings during periods of low stream flow may be permitted an increased discharge load year-round or during seasons of high flow, as appropriate;

(iii) Beneficial effects. Land application, upland wetlands application, or other non-discharge alternatives for appropriately treated wastewater may replenish groundwater levels and increase streamflow and assimilative capacity during otherwise low streamflow periods.

(B) Economic Effects Criteria. When assimilative capacity exists in a stream, and when it is judged that increased loading will not have significantly greater adverse environmental effects than other alternatives to increased discharge, the economic effect of increased loading will be considered. Economic effects will be of two general types:

(i) Value of Assimilative Capacity. The assimilative capacity of Oregon's streams are finite, but the potential uses of this capacity are virtually unlimited. Thus it is

important that priority be given to those beneficial uses that promise the greatest return (beneficial use) relative to the unused assimilative capacity that might be utilized. In-stream uses that will benefit from reserve assimilative capacity, as well as potential future beneficial use, will be weighed against the economic benefit associated with increase loading;

(ii) Cost of Treatment Technology. The cost of improved treatment technology, non-discharge and limited discharge alternatives shall be evaluated.

(4)(a) A receiving stream shall be designated as water quality limited through the biennial water quality status assessment report prepared to meet the requirements of Section 305(b) of the Water Quality Act. Appendix A of the Status Assessment report shall identify: What waterbodies are water quality limited, the time of year the water quality standards violations occur, the segment of stream or area of waterbody limited, the parameter(s) of concern, whether it is water quality limited under OAR 340-41-006(30)(a), (b) or (c). Appendix B and C of the Status Assessment report shall identify the specific evaluation process for designating waterbodies limited;

(b) The WQL list contained in Appendix A of the Status Assessment report shall be placed on public notice and reviewed through the public hearing process. At the conclusion of the hearing process and the evaluation of the testimony received, Appendix A will become the official water quality limited list. The Department may add a waterbody to the water quality limited list between status assessment reports after placing that action out on public notice and conducting a public hearing;

(c) For interstate waterbodies, the state shall be responsible for completing the requirements of section (3) of this rule for that portion of the interstate waterbody within the boundary of the state;

(d) For waterbodies designated WQL under OAR 340-41-006(30)(c), the Department shall establish a priority list and schedule for future water quality monitoring activities to determine; if the waterbody should be designated WQL under OAR 340-41-006(30)(a) or (b), if estimated TMDLs need to be prepared, and if an implementation plan needs to be developed and implemented;

(e) For waterbodies designated WQL under OAR 340-41-006(30)(b), requests for load increases shall be considered following subsection (3)(b) of this rule.

(5) For any new waste sources, alternatives which utilize reuse or disposal with no discharge to public waters shall be given highest priority for use wherever practicable. New source discharges may be approved subject to the criteria in section (3) of this rule.

(6) No discharges of wastes to lakes or reservoirs shall be allowed except as provided in section (3) of this rule.

(7) Log handling in public waters shall conform to current EQC policies and guidelines.

(8) Sand and gravel removal operations shall be conducted pursuant to a permit from the Division of State Lands and separated from the active flowing stream by a water-tight berm wherever physically practicable. Recirculation and reuse of process water shall be required

wherever practicable. Discharges, when allowed, or seepage or leakage losses to public waters shall not cause a violation of water quality standards or adversely affect legitimate beneficial uses.

(9) Logging and forest management activities shall be conducted in accordance with the Oregon Forest Practices Act so as to minimize adverse effects on water quality.

(10) Road building and maintenance activities shall be conducted in a manner so as to keep waste materials out of public waters and minimize erosion of cut banks, fills, and road surfaces.

(11) In order to improve controls over nonpoint sources of pollution, federal, state, and local resource management agencies will be encouraged and assisted to coordinate planning and implementation of programs to regulate or control runoff, erosion, turbidity, stream temperature, stream flow, and the withdrawal and use of irrigation water on a basin-wide approach so as to protect the quality and beneficial uses of water and related resources. Such programs may include, but not be limited to, the following:

(a) Development of projects for storage and release of suitable quality waters to augment low stream flow;

(b) Urban runoff control to reduce erosion;

(c) Possible modification of irrigation practices to reduce or minimize adverse impacts from irrigation return flows;

(d) Stream bank erosion reduction projects.

Biological Criteria

340-41-027 Waters of the state shall be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities.

Policy on Sewerage Works Planning and Construction

340-41-034 (1) Oregon's publicly owned sewerage utilities have since 1956 developed an increasing reliance on federal sewerage works construction grant funds to meet a major portion of the cost of their sewerage works construction needs. This reliance did not appear unreasonable based on federal legislation passed up through 1978. Indeed, the Environmental Quality Commission (EQC) has routinely approved compliance schedules with deadlines contingent on federal funding. This reliance no longer appears reasonable based on recent and proposed legislative actions and appropriations and the general state of the nation's economy.

(2) The federal funds expected for future years will address a small percentage of Oregon's sewerage works construction needs. Thus, continued reliance by DEQ and public agencies on federal funding for sewerage works construction will not assure that sewage from a growing Oregon population will be adequately treated and disposed of so that health hazards and nuisance conditions are prevented and beneficial uses of public waters are not threatened or impaired by quality degradation.

(3) Therefore, the following statements of policy are established to guide future sewerage works planning and construction:

(a) The EQC remains strongly committed to its historic program of preventing water quality problems by requiring control facilities to be provided prior to the connection of new or increased waste loads;

(b) The EQC urges each sewerage utility in Oregon to develop, as soon as practicable, a financing plan which will assure that future sewerage works construction, operation, maintenance and replacement needs can be met in a timely manner. Such financing plans will be a prerequisite to Department issuance of permits for new or significantly modified sewerage facilities, for approval of plans for new or significantly modified sewerage facilities, or for access to funding assistance from the state pollution control bond fund. The Department may accept assurance of development of such financing plan if necessary to prevent delay in projects already planned and in the process of implementation. The Department will work with the League of Oregon Cities and others as necessary to aid in the development of financing plans;

(c) No sewerage utility should assume that it will receive grant assistance to aid in addressing its planning and construction needs;

(d) existing sewerage facility plans which are awaiting design and construction should be updated where necessary to include:

(A) Evaluation of additional alternatives where appropriate, and re-evaluation of costs of existing alternatives;

(B) Identification and delineation of phased construction alternatives; and

(C) A financing plan which will assure ability to construct facilities over an appropriate time span with locally derived funds.

(e) New sewerage works facility planning initiated after October 1, 1981 should not be approved without adequate consideration of alternatives and phased construction options, and without a financing plan which assures adequate funding for construction, operation, maintenance and replacement of sewerage facilities:

(A) The EQC recognizes that many cities in need of immediate sewerage works construction have completed planning and are awaiting design or construction funding. These cities have developed their program relying on 75 percent federal grants. They will have difficulty developing and implementing alternatives to fund immediate construction needs. Many are, or will be, under moratoriums on new connections because existing facilities are at, or near, capacity. The EQC will consider the following interim measures as a means of assisting these cities to get on a self-supporting basis provided that an approvable long-range program is presented:

(i) Temporary increases in waste discharge loading may be approved provided a minimum of secondary treatment, or equivalent control is maintained and beneficial uses of the receiving waterway are not impaired;

(ii) Installation and operation of temporary treatment works may be approved providing:

(I) The area served is inside an approved urban growth boundary and the proposal is consistent with State Land Use Planning laws;

(II) A master sewerage plan is adopted which shows how and when the temporary facilities will be phased out;

(III) The public agency responsible for implementing the master plan is the owner and operator of the temporary facilities;

(IV) Sewerage service to the area served by the temporary facility is necessary as part of the financing program for master plan implementation and no other option for service is practicably available;

(V) An acceptable receiving stream or method of effluent disposal is available for the temporary facility.

(B) Compliance schedules and other permit requirements may be modified to incorporate an approved interim program. Compliance with a permit so modified will be required at all times.

(f) Sewerage Construction programs should be designed to eliminate raw sewage bypassing during the summer recreation season (except for a storm event greater than the one in ten year 24 hour storm) as soon as practicable. A program and timetable should be developed through negotiation with each affected source. Bypasses which occur during the remainder of the year should be eliminated in accordance with an approved longer term maintenance based correction program. More stringent schedules may be imposed as necessary to protect drinking water supplies and shellfish growing areas;

(g) Any sewerage utility that is presently in compliance and foresees a need to plan for future expansion to accommodate growth but elects to wait for federal funds

for planning and construction will make such election with full knowledge that if existing facilities reach capacity before new facilities are completed, a moratorium on new connections will be imposed. Such moratorium will not qualify them for any special consideration since its presence is deemed a matter of their choice;

(h) The Department will continue to assist cities to develop interim and long-range programs, and construction schedules and to secure financing for essential construction.

Special Water Quality Standards for Public Waters of Goose Lake in Lake County

340-41-035 [SA 26, f. 6-1-67; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for Public Waters of the Main Stem Klamath River

340-41-040 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for the Public Waters of Multnomah Channel and the Main Stem Willamette River

340-41-045 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for the Public Waters of the Main Stem of the Columbia River From the Eastern Oregon-Washington Border Westward to the Pacific Ocean

340-41-050 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Implementation Program Applicable to All Basins

340-41-120 (1) No waste treatment and disposal facilities shall be constructed or operated and no wastes shall be discharged to public waters without obtaining a permit from the Department as required by ORS 468.740.

(2) Plans for all sewage and industrial waste treatment, control, and disposal facilities shall be submitted to the Department for review and approval prior to construction as required by ORS 468.742.

(3) Minimum design criteria for waste treatment and control facilities prescribed under this plan and such other waste treatment and controls as may be necessary to insure compliance with the water quality standards contained in this plan shall be provided in accordance with specific permit conditions for those sources or activities for which permits are required and the following implementation program:

(a) For new or expanded waste loads or activities, fully approved treatment or control facilities, or both shall be provided prior to discharge of any wastes from the new or expanded facility or conduct of the new or expanded activity;

(b) For existing waste loads or activities, additional treatment or control facilities necessary to correct specific unacceptable water quality conditions shall be provided in accordance with a specific program and timetable incorporated into the waste discharge permit for the individual discharger or activity. In developing treatment requirements and implementation schedules for existing installations or activities, consideration shall be given to the impact upon the overall environmental quality including air, water, land use, and aesthetics;

(c) Wherever minimum design criteria for waste treatment and control facilities set forth in this plan are more stringent than applicable federal standards and treatment levels currently being provided, upgrading to the more stringent requirements will be deferred until it is necessary to expand or otherwise modify or replace the existing treatment facilities. Such deferral will be acknowledged in the permit for the source;

(d) Where planning or design or construction of new or modified waste treatment and controls to meet prior applicable state or federal requirements is underway at the time this plan is adopted, such plans, design, or construction may be completed under the requirements in effect when the project was initiated. Timing for upgrading to meet more stringent future requirements will be as provided in section (3) of this rule.

(6) Where minimum requirements of federal law or enforceable regulations are more stringent than specific provisions of this plan, the federal requirements shall prevail.

(9) The Department shall calculate and include effluent limits specified in pounds per day, which shall be the mass load limits for biochemical oxygen demand or carbonaceous biochemical oxygen demand and total suspended solids in National Pollutant Discharge Elimination System permits issued to all sewage treatment facilities. These limits shall be calculated as follows:

(a) Except as noted in paragraph (H) of this subsection, for existing facilities and for facilities receiving engineering plans and specifications approval from the Department for new treatment facilities or treatment facilities expanding the average dry weather treatment capacity, prior to June 30, 1992:

(A) During periods of low stream flows (approximately May 1 through October 31), the monthly average mass load expressed as pounds per day shall not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34 pounds per gallons. The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5. The daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0;

(B) During the period of high stream flows (approximately November 1 through April 30), the monthly average mass load expressed as pounds per day shall not exceed the monthly concentration effluent limit times the design average wet weather flow expressed in million gallons per day times 8.34 pounds per gallon. The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5. The

daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0;

(C) On any day that the daily flow to a sewage treatment facility exceeds the lesser hydraulic capacity of the secondary treatment portion of the facility or twice the design average dry weather flow, the daily mass load limit shall not apply. The permittee shall operate the treatment facility at highest and best practicable treatment and control;

(D) The design average wet weather flow used in calculating mass loads shall be approved by the Department in accordance with prudent engineering practice and shall be based on a facility plan approved by the Department, engineering plans and specifications approved by the Department, or an engineering evaluation. The permittee shall submit documentation describing and supporting the design average wet weather flow with the permit application, application for permit renewal, or modification request, or upon request by the Department. The design average wet weather flow is defined as the average flow between November 1 and April 30 when the sewage treatment facility is projected to be at design capacity for that portion of the year;

(E) Mass loads assigned as described in paragraphs (B) and (C) of this subsection will not be subject to OAR 340-41-026(3);

(F) Mass loads as described in this rule will be included in permits upon renewal, or upon permit modification request;

(G) Within 180 days after permit renewal or modification, permittees receiving higher mass loads under this rule and having a separate sanitary sewer system shall submit to the Department for review and approval a proposed program and time schedule for identifying and reducing inflow. The program shall consist of the following:

(i) Identification of all overflow points and verification that sewer system overflows are not occurring up to a 24-hour, five-year storm event or equivalent;

(ii) Monitoring of all pump station overflow points; and

(iii) A program for identifying and removing all inflow sources into the permittees sewer system over which the permittee has legal control; and

(iv) For those permittees not having the necessary legal authority for all portions of the sewer system discharging into the permittee's sewer system or treatment facility, a program and schedule for gaining legal authority to require inflow reduction and a program and schedule for removing inflow sources;

(v) Within one year after the Department's approval of the program, the permittee shall begin implementation of the program.

(H) Paragraphs (A) through (G) of this subsection shall not apply to the cities of Athena, Elgin, Adair Village, Halsey, Harrisburg, Independence, Carlton and Sweet Home. Mass load limits have been individually assigned to these facilities.

(b) For new sewage treatment facilities or treatment facilities expanding the average dry weather treatment capacity, and receiving engineering plans and specifications approval from the Department after June 30, 1992, the mass load limits shall be calculated by the Department based on the proposed treatment facility capabilities and the highest and best practicable treatment to minimize the discharge of pollutants;

(c) Mass load limits as defined in this rule may be replaced by more stringent limits if required by waste load allocations established in accordance with a TMDL for treatment facilities discharging to water quality limited streams, or if required to prevent or eliminate violations of water quality standards;

(d) In the event that the design average wet weather flow or the hydraulic secondary treatment capacity is not known or has not been approved by the Department at the time of permit issuance, the permit shall include as interim mass load limits the mass load limits in the previous permit issued to the permittee for the treatment facility. The permit shall also include a requirement that the permittee shall submit to the Department the design average wet weather flow and hydraulic secondary treatment capacity within 12 months after permit issuance. Upon review and approval of the design flow information, the department will modify the permit and include mass load limits as described in subsection (a) of this section;

(e) Each permittee with existing sewage treatment facilities otherwise subject to subsection (a) of this section may choose mass load limits calculated as follows:

(A) The monthly average mass load expressed as pounds per day shall not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34 pounds per gallon;

(B) The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5;

(C) The daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0. In the event that existing mass load limits are retained by the permittee, the terms and requirements of subsection (a) of this section shall not apply.

(f) The Commission may grant exceptions to subsection (a) of this section. In allowing increased discharged loads, the Commission shall make the findings specified in OAR 340-41-026(3) for waste loads, and in addition shall make the following findings:

(i) That mass loads as calculated in subsection (a) of this section cannot be achieved with the existing treatment facilities operated at maximum efficiency at projected design flows; and

(ii) That there are no practicable alternatives to achieving the mass loads as calculated in subsection (a) of this section.

Nuisance Phytoplankton Growth

340-41-150 The following values and implementation program shall be applied to lakes, reservoirs, estuaries and streams, except for ponds and reservoirs less than ten acres in surface area, marshes and saline lakes:

(1) The following average Chlorophyll **a** values shall be used to identify water bodies where phytoplankton may impair the recognized beneficial uses:

(a) Natural lakes which thermally stratify: 0.01 mg/l;

(b) Natural lakes which do not thermally stratify, reservoirs, rivers and estuaries: 0.015 mg/l;

(c) Average Chlorophyll **a** values shall be based on the flowing methodology (or other methods approved by the Department): A minimum of three samples collected over any three consecutive months at a minimum of one representative location (e.g., above the deepest point of a lake or reservoir or at a point mid-flow of a river) from samples integrated from the surface to a depth equal to twice the secchi depth or the bottom (the lesser of the two depths); analytical and quality assurance methods shall be in accordance with the most recent edition of **Standard Methods for the Examination of Water and Wastewater.**

(2) Upon determination by the Department that the values in section (1) of this rule are exceeded, the Department shall:

(a) In accordance with a schedule approved by the Commission, conduct such studies as are necessary to describe present water quality; determine the impacts on beneficial uses; determine the probable causes of the exceedance and beneficial use impact; and develop a

proposed control strategy for attaining compliance where technically and economically practicable. Proposed strategies could include standards for additional pollutant parameters, pollutant discharge load limitations, and other such provisions as may be appropriate. Where natural conditions are responsible for exceedance of the values in section (1) of this rule or beneficial uses are not impaired, the values in section (1) of this rule may be modified to an appropriate value for that water body;

(b) Conduct necessary public hearings preliminary to adoption of a control strategy, standards or modified values after obtaining Commission authorization;

(c) Implement the strategy upon adoption by the Commission.

(3) In cases where waters exceed the values in section (1) of this rule and the necessary studies are not completed, the Department may approve new activities (which require Department approval), new or additional (above currently approved permit limits) discharge loadings from point sources provided that it is determined that beneficial uses would not be significantly impaired by the new activity or discharge.

[**Publications:** The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Willamette Basin

Beneficial Water Uses to be Protected

340-41-442 Water quality in the Willamette River Basin (see **Figures 1** and 7) shall be managed to protect the recognized beneficial uses as indicated in **Table 6.**

Water Quality Standards Not to be Exceeded (To be Adopted Pursuant to ORS 468.735 and Enforceable Pursuant to ORS 468.720, 468.990, and 468.992)

340-41-445 (1) Notwithstanding the water quality standards contained below, the highest and best practicable treatment and/or control of wastes, activities, and flows shall in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Willamette River Basin:

(a) Dissolved oxygen (DO):

(A) Multnomah Channel and main stem Willamette River from mouth to the Willamette Falls at Oregon City, river mile 26.6: The DO concentrations shall not be less than 5 mg/l;

(B) Main stem Willamette River from the Willamette Falls to Newberg, river mile 50: The DO concentrations shall not be less than 6 mg/l;

(C) Main stem Willamette River from Newberg to Salem, river mile 85: The DO concentrations shall not be less than 7 mg/l;

(D) Main stem Willamette River from Salem to confluence of Coast and Middle Forks, river mile 187: The DO concentrations shall not be less than 90 percent of saturation;

(E) All other Willamette Basin streams:

(i) Salmonid fish producing waters: The DO concentration shall not be less than 90 percent of saturation at seasonal low or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes;

(ii) Non-Salmonid fish producing waters: The DO concentration shall not be less than 6 mg/l.

(F) Columbia River (river mile 86 to 120): The DO concentration shall not be less than 90 percent of saturation.

* * *

(c) Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration

activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

(A) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;

(B) Dredging, Construction or other Legitiamte Activities: Permit or certification authorized under terms of Section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

(d) pH (hydrogen ion concentration): pH values shall not fall outside the following ranges:

(A) Columbia River: 7.0-8.5;

(B) All other basin waters: 6.5-8.5.

(e) Bacteria Standards:

(A) Effective upon filing and through June 30, 1995. Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples). Freshwaters: A log mean of 200 fecal coliform per 100 milliliters based on a minimum of five samples in a 30-day period with no more than ten percent of the samples in the 30-day period exceeding 400 per 100 ml.

(B) Effective July 1, 1995. Bacteria of coliform group associated with fecal sources and bacteria of the enterococci group (MPN or equivalent membrane filtration using a representative number of samples) shall not exceed the criteria values described in this paragraph. However, the Department may designate site-specific bacteria criteria on a case-by-case basis to protect beneficial uses. Site specific values shall be described in and included as part of a water quality management plan. Freshwaters: A geometric mean of 33 enterococci per 100 milliliters based on no fewer than five samples, representative of seasonal conditions, collected over a period of at least 30 days. No single sample should exceed 61 enterococci per 100 ml.

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Issuance of NPDES Permtis

340-45-035 (1) Following determination that it is complete for processing, each application will be reviewed on its own merits. Recommendations will be developed in accordance with provisions of all applicable statutes, rules, regulations, and effluent guidelines of the State of Oregon and the U.S. Environmental Protection Agency.

(2) The Department shall formulate and prepare a tentative determination to issue or deny an NPDES permit for the discharge described in the application. If the tentative determination is to issue an NPDES permit, then a proposed NPDES permit shall be drafted which includes at least the following:

(a) Proposed effluent limitations;

(b) Proposed schedule of compliance, if necessary; established in conformance with the Federal Act and regulations issued pursuant thereto;

(c) Other special conditions.

(3)(a) In order to inform potentially interested persons of the proposed discharge and of the tentative determination to issue an NPDES permit, a public notice announcement shall be prepared and circulated in a manner approved by the Director. In addition to the information required under OAR 340-11-007(1) the public notice shall contain:

(A) A description (when available) of the water quality of the receiving water body both upstream and downstream;

(B) If the waterbody is water quality limited under Section 303(d)(1) of the Clean Water Act, a description of whether the permit relates to the parameter(s) which is water quality limited; if so, how the permit will fit within the existing TMDLs or if no TMDL exists, how it is acceptable; and

(C) A description of any load increase proposed and action required for its approval.

(b) The notice shall encourage comments by interested individuals or agencies, and shall tell of the availability of fact sheets, proposed NPDES permits, applications, and other related documents available for public inspection and copying. The Director shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit written views and comments. All comments submitted during the 30-day comment period shall be considered in the formulation of a final determination.

(4) A fact sheet shall be prepared for each draft NPDES permit for a major industrial facility and each NPDES general permit. In addition, a fact sheet shall be prepared for every industrial NPDES permit which incorporates a variance and for every draft permit which the Director finds is the subject of widespread public interest or raises major issues. Fact sheets shall contain the following, where applicable:

(a) A brief description of the type of facility or activity;

(b) The type and quantity of wastes to be discharged;

(c) Applicable standards and guidelines used as a basis for effluent limits;

(d) An explanation of any proposed variances;

(e) A sketch, map, or detailed location of the discharge, where appropriate;

(f) Information spelling out procedures for finalizing the permit and providing additional public input, including opportunity for public hearing; and

(g) Where appropriate, an assessment of future control needs based on the adequacy of present controls, records of compliance, applicable rules and regulations.

(5) After the public notice has been drafted and the fact sheet and proposed NPDES permit provisions have been prepared by the Department, they will be forwarded to the applicant for review and comment. All comments must be submitted in writing within 14 days after mailing of the proposed materials if such comments are to receive consideration prior to final action on the application, unless the applicant requests additional time. The applicant may also waive his right for the 14-day review time in the interest of accelerating the issuance procedures.

(6) After the 14-day applicant review period has elapsed, the public notice and fact sheet shall be sent to any person upon request. The director shall add the name of any person or group upon request to a mailing list to receive copies of public notices and fact sheets. Any public notice and fact sheet under this section shall be prepared and circulated consistent with the requirements of regulations issued under the Federal Act. The fact sheet, proposed NPDES permit provisions, application,

and other supporting documents will be available for public inspection and copying. The Director may, in his discretion, charge a reasonable fee for reproduction and distribution of the public notice, fact sheet, and other supporting documents.

(7) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for a public hearing with respect to NPDES applications. If the Director determines that useful information may be produced thereby, or if there is a significant public interest in holding a hearing, or there are written requests for a hearing from ten persons or from an organization or organizations representing at least ten persons, a public hearing will be held prior to the Director's final determination. Instances of doubt shall be resolved in favor of holding the hearing. There shall be public notice of such a hearing.

(8) At the conclusion of the public involvement period, the Director shall make a final determination as soon as practicable and promptly notify the applicant thereof in writing. Any NPDES permit issued hereunder shall contain such pertinent and particular conditions as may be required to comply with the Federal Act or regulations issued pursuant thereto. If the Director determines that the NPDES permit should be denied, notification shall be in accordance with OAR 340-45-050. If conditions of the NPDES permit issued are different from the proposed provisions forwarded to the applicant for review, the notification shall include the reasons for the changes made. A copy of the NPDES permit issued shall be attached to the notification. In any case, before

the Director will issue an NPDES permit which applies effluent limitations in accordance with effluent guidelines rather than water quality standards, he will make a determination that the permitted discharge will not violate applicable water quality standards and will provide some justification for that determination. Such justification will include, but not necessarily be limited to:

(a) A description of the anticipated effect on water quality at the mixing zone boundary of the chemical and/or physical parameter(s) upon which the size and shape of the mixing zone are based; and

(b) A statement of anticipated effect of the discharge on aquatic life.

(9) If the applicant is dissatisfied with the conditions or limitations of any NPDES permit issued by the Director, he may request a hearing before the Commission or its authorized representative. Such a request for hearing shall be made in writing to the Director within 20 days of the date of mailing of the notification of issuance of the NPDES permit. Any hearing held shall be conducted pursuant to the regulations of the Department.